

DO NEW CRIMES NEED NEW LAWS?

Legal provisions available for prosecuting human trafficking

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South Africa seems well on the way to creating specialised human trafficking legislation. The country is a signatory to the United Nations Protocol on Trafficking in Persons, and the SA Law Reform Commission is investigating the issue of trafficking. But there are many legal provisions currently available for prosecuting those engaging in this practice. Perhaps a greater challenge for the prosecution is how to identify acts that constitute 'trafficking in persons'.

At present there is no specific legal framework in South Africa that provides for the criminalisation of trafficking in persons for the purposes of sexual exploitation. This situation could change, as South Africa has signed the United Nations Protocol on Trafficking in Persons, and the South African Law Reform Commission (SALRC) is currently investigating trafficking in general. There is also a proposal to introduce interim legislation to address various aspects of trafficking. The Sexual Offences Bill (discussed below) has included a provision on trafficking specifically with regard to sexual exploitation.

Despite these developments, it is debatable whether there is indeed a need for special legal provisions, or whether the current dispensation adequately accommodates the prosecution of such acts.

This article explores the current available provisions in both common and legislative law that may be utilised for prosecuting trafficking in persons for the purposes of sexual exploitation. International instruments, and proposed South African legislation that specifically address this issue will also briefly

be discussed. Although trafficking in general is not dealt with in South African law, this article will only be addressing the problem, and use of South African law, in the context of sexual offences.

Other than the question of whether specialised legislation is necessary, the drafters of legislation will also face the complex question of what exactly constitutes the offence of trafficking, what the elements of the crime are, and what the prosecution is required to prove beyond a reasonable doubt in order to secure a conviction. This article will not attempt to answer these questions, save to mention that before extensive resources are used for developing and implementing new trafficking laws, a close examination of the available options for prosecutions of this conduct is necessary.

The South African Constitution *Section 28*

The Bill of Rights in chapter 2 of the Constitution provides for the specific protection of the rights of children. This section sets out the context for legislation that protects children, and provides what many children's rights activists regard as the cornerstone for developing specific legislation

prohibiting trafficking in persons, particularly children.

Sections 231, 232 and 233

These sections deal with the use of international law in South Africa. In terms of s231, an international agreement binds the Republic, and it only becomes law when it is enacted into law by national legislation. S233 dictates that when a court interprets any legislation, the court must "prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

The effect of these sections is that international law has persuasive authority in the courts – not binding authority – unless passed into domestic law. It does however open the way for the introduction into evidence of international legal instruments to which South Africa is a party. Given that South Africa has signed and ratified a number of international instruments that directly address trafficking in persons, it can be argued that these instruments may have persuasive authority in the interpretation of the national law that currently operates in this country.

The common law

There is no common law provision dealing with trafficking per se. Depending on the circumstances of a particular case, there are a number of options available to the prosecution in terms of which a person suspected of being involved in human trafficking for the purposes of sexual exploitation may be charged. These options include:

- abduction: the unlawful and intentional removal of an unmarried minor from the control of her/his parents or guardian with the intention of having sexual intercourse with the minor;
- kidnapping: the unlawful and intentional deprivation of a person of her/his freedom of movement;
- rape: unlawful and intentional sexual intercourse with a woman without her consent;
- indecent assault: unlawful and intentional assault with the object of committing an indecency;
- assault: unlawful and intentional application of force to the person of another.

The Sexual Offences Act

This Act was passed in 1957, and is to a large extent no longer used by the prosecution. However, there are a number of provisions that may be of use when prosecuting a case involving trafficking. A broad selection of these sections include:

- section 2, which makes it illegal to keep a brothel, a brothel being defined as "any house or place kept for the purposes of prostitution or for persons to visit for the purposes of having unlawful carnal intercourse or any other lewd or indecent purpose";
- section 9 creates the offence of procuring a child to have unlawful carnal intercourse with another person;
- section 10 makes it unlawful to procure an adult female for the same reasons;
- section 12 criminalises the detaining of a female against her will, either with the intention that she would have sexual intercourse with a male, or with the intention that she be detained in a brothel;
- section 14 prohibits proscribed sexual offences with youths;
- section 20 prohibits living off the earnings of prostitution or assisting in the commission of indecent acts.

The Child Care Act

This piece of legislation is expressly targeted at the protection of children, and section 50A provides for protection specifically against the commercial sexual exploitation of children. Section 51 prohibits the unlawful removal of children, while section 52A prohibits the employment of certain children.

Both the Sexual Offences Act and the Child Care Act could successfully be used in the prosecution of persons when individuals have been removed from where they would choose to be (geographically), and forced to provide sexual services to other persons i.e. forced prostitution. These pieces of legislation can also be used to prosecute those who benefit financially from these services.

The Prevention of Organised Crime Act 121 of 1998

It is possible that a prosecution for the activities of trafficking may be conducted in terms of the above

Act. Chapter 2 of the Act covers offences relating to racketeering activities. Broadly, it makes it an offence to be involved in racketeering, and to receive, use and/or invest in, any property derived from a pattern of racketeering activity.

This activity is defined as the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1. For the purposes of this article, the relevant Schedule 1 offences are rape, kidnapping, indecent assault, and the statutory offences of sections 14 and 20 of the Sexual Offences Act. In terms of the Prevention of Organised Crime Act, a number of other provisions may also be useful in this context:

- chapter 3 deals with the proceeds of unlawful activities;
- chapter 4 deals with criminal gang activities; and
- chapters 5 and 6 deal with the forfeiture of assets obtained unlawfully.

Probably the greatest challenge facing the prosecution if provisions, specifically chapter 2 of this Act, were used to prosecute human trafficking would be to prove the 'organised' element of the conduct – the 'pattern of racketeering activity'.

Miscellaneous legislation

There are a number of other pieces of legislation that could be used to prosecute activities that may constitute trafficking. The Films and Publications Act provides for the offences of possession, production and distribution of child pornography (s27). The Immigration Act 13 of 2002 prohibits the entry of certain persons into the Republic, while various provisions of the Intimidation Act 72 of 1982 and the Corruption Act 94 of 1992 may be used creatively as the context dictates.

The Criminal Law (Sexual Offences) Amendment Bill

This proposed legislation now contains a specific provision on the trafficking of persons in the context of sexual offences. Chapter 5 of the Bill defines trafficking as:

- the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person;

- within or across the borders of SA;
- for use in sexual acts, including sexual exploitation or pornography of the person.

The offence of trafficking would therefore consist of a situation in which 'A' trafficks 'B' without the consent, or free agreement, of B. B does not freely agree if there is:

- use of force;
- threat of harm;
- abuse of power or authority; and
- lack of criminal capacity, which would automatically apply to a child.

Compensation

International instruments require member states to develop measures to ensure that victims of trafficking obtain compensation for damage suffered. At this juncture, South African legislation does not provide adequately for this situation, with victims having to rely on section 300 of the Criminal Procedure Act which makes compensation possible when the offence caused damage or loss of property, including money. This effectively does not provide for compensation relating to pain and suffering, and emotional and psychological damage.

Challenges for prosecutors

As can be seen from the range of legal provisions available to prosecute cases of trafficking, an argument may be made that there is little use for specific trafficking legislation. However, given the complexity of identifying the appropriate legal provisions that need to be applied to any particular case, it may be argued that there is a need for a single piece of legislation that encapsulates all the above provisions, with alterations where necessary. This would create the specific offence of trafficking, and thereby provide the legal framework to investigate and prosecute trafficking with more ease and focus.

Other challenges that would face the prosecution of cases of this nature include the proper identification of cases that constitute 'trafficking in persons'. This requires a concrete understanding of exactly what is meant by 'trafficking' and a decision as to whether there is a need for the creation of a

specific offence, or whether the use of current provisions is adequate.

Prosecutors need to be vigilant and knowledgeable regarding the application of appropriate laws to the alleged criminal conduct envisaged in trafficking. The coordination and cooperation of law enforcement agencies, both nationally and internationally is also essential if conduct of this nature is to be curbed.

Once victims do come forward to testify in these cases, the prosecution must ensure their safety through the use of protective measures such as witness protection, testifying *in camera*, use of the intermediary system,¹ and the protection of the victim's identity in terms of sections 154 and 335A of the Criminal Procedure Act.

Endnotes

- 1 This is a system in which a third person is used, through whom a witness listens to questions from the court, prosecutor and accused. The witness may also give evidence through this person. Both the witness and intermediary are placed in a separate room from the court, and the questions from the above persons are posed to the intermediary by means of earphones. The question is then repeated to the witness in a language and tone appropriate to the age of the witness. The questions/answers, and conduct of the witness and intermediary are relayed into court by means of the closed circuit television system, with sound.